Supreme Court, U.S.
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90-1257

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

IVAN C. CLEVELAND,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON STATE COURT OF APPEALS,
DIVISION I

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Under the constitutional principle of collateral estoppel, is a criminal defendant entitled to the benefit of findings made in a civil proceeding in which the defendant was not a party?

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STATUTE INVOLVED

At the time of the proceedings in this case, the admissibility of a child's out-of-court statements was governed by the following Washington statute:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the State of Washington if:
> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
> A statement may not be admitted under this section unless the

> proponent of the statement makes known to the adverse party his intent to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

1982 Wash. Laws, ch. 129 § 2.

STATEMENT OF THE CASE

The petitioner, Ivan C. Cleveland, has been convicted of attempted first degree statutory rape and indecent liberties. The victim of these crimes was Kelsey Knight. Kelsey is the adopted daughter of Vicky Cleveland, petitioner's wife. The crimes first came to light when Kelsey reported them to a teacher on April 30, 1985. Kelsey later described the crimes to other people, including police officers, a social worker, and a child therapist.

On May 3, 1985, the State of Washington, acting through the Attorney General's Office, filed a dependency petition on Kelsey's behalf. The petition alleged that Mr. Cleveland had abused Kelsey and that Ms. Cleveland had refused to require him to move out of the home. A hearing on this petition was held on June 11 and July 23, 1985. At the hearing, the Assistant Attorney General stated, without objection, that Mr. Cleveland "officially has no standing before the court."

At the time of the dependency hearing, a child's out-of-court descriptions of sexual abuse were admissible only in criminal

proceedings.[1] 1982 Wash. Laws, ch. 129 §2. As a result, Kelsey's testimony provided the only evidence of the abuse. Evidence concerning her statements was excluded as hearsay. Mr. Cleveland denied any abuse. The judge found the evidence to be "exactly balanced." Accordingly, he determined that the State had not proved the allegations in the dependency petition by a preponderance of the evidence. The petition was therefore dismissed.

Meanwhile, on July 17, 1985, the State, acting through the County

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1 The text of the statute is set out above. The statute was subsequently amended to allow these statements to be admitted in juvenile dependency proceedings. 1985 Wash. Laws, ch. 404, § 1, codified as Wash. Rev. Code § 9A.44.120.

Prosecutor's Office, filed an information charging Mr. Cleveland with first degree statutory rape. The information was later amended to add a charge of indecent liberties.

Trial began on October 28, 1985. At trial, the State introduced both Kelsey's testimony and evidence of her statements. To explain inconsistencies between the testimony and the statements, an expert witness testified concerning victims' reluctance to disclose abuse. Mr. Cleveland again denied any abuse. On November 1, the jury found him guilty of attempted first degree statutory rape and indecent liberties. Because Mr. Cleveland absconded the jurisdiction,[2]

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2 He was convicted of bail jumping as a
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he was not sentenced until September 9, 1988.

SUMMARY OF THE ARGUMENT

The issue presented by the petition is whether non-mutual collateral estoppel will result from findings in civil cases. This court has already held that non-mutual estoppel does not arise from findings in criminal cases. Standefer v. United States, 447 U.S. 10, 64 L.Ed.2d 689, 100 S.Ct. 1999 (1980).

Most of the reasoning of Standefer applies equally here. Standefer states that application of non-mutual estoppel is unwarranted when evidentiary rules prevent the government from presenting

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result.

all of its proof in the first case. The child's out-of-court statements were a major portion of the State's proof in the criminal case. Under Washington law, these statements were inadmissible at the dependency hearing.

Petitioner claims that this case illustrates how the State can use a civil case to refine and hone its presentation for a criminal case. Contrary to this claim, most of the differences between the dependency proceeding and the criminal proceedings resulted from this difference in the applicable rules of evidence.

Petitioner asserts that Washington is using a different standard for collateral estoppel in criminal cases

than it uses in civil cases. In fact, the standard used here by the Washington Court of Appeals is identical to the standard used by that court in civil cases.

Finally, petitioner claims that the decision here conflicts with the approach taken by California courts. The California Court of Appeals has held that criminal proceedings can be estopped by findings in dependency proceedings. Lockwood v. Superior Court, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984). Lockwood, however, does not involve non-mutual estoppel. Also, a recent decision of the California Supreme Court casts doubt on the reasoning of Lockwood. Lucido v. Superior Court, 51 Cal. 3d 335,

272 Cal. Rptr. 767, 795 P.2d 1223 (1990).

ARGUMENT

Petitioner is seeking to have findings in civil cases accorded far greater collateral estoppel effect than findings in criminal cases. Had the dependency proceeding been a criminal case, collateral estoppel would clearly not be constitutionally required, because petitioner was not a party to that proceeding. An acquittal of one defendant does not collaterally estop criminal proceedings against another defendant. Standefer v. United States, 447 U.S. 10, 64 L.Ed.2d 689, 100 S.Ct. 1999 (1980).

The court in Standefer gave essentially three reasons for refusing to apply collateral estoppel: (1) The State's inability to obtain review of a verdict that is contrary to the evidence; (2) The possibility that evidence inadmissible against one party could be admissible against another; (3) The important interest in the enforcement of the criminal law. Id. at 22-25. Admittedly, the first reason does not apply to a finding in a civil case.

On the other hand, the second reason fully applies here. The victim's out-of-court statements were a key portion of the State's evidence at the criminal trial. These statements were not admissible at the dependency hearing.

"[W]here evidentiary rules prevent the Government from presenting all its proof in the first case, application of non-mutual estoppel would be plainly unwarranted." Id. at 24.

Of course, the third reason cited in Standefer applies as well--the State has a compelling interest in enforcing its laws against sexual abuse of children. Thus, under the reasoning of Standefer, non-mutual collateral estoppel should not be applied.

Petitioner claims that the State used the dependency trial to "refine and hone its case" for the criminal trial. Contrary to petitioner's claim, the primary difference between the two hearings was not simply the presence of

an expert witness at the criminal trial. The primary difference was the admission of the child's out-of-court statements. As the Washington Supreme Court has recognized, the admissibility of such statements "is crucial to the successful prosecution of many child sex offenses." State v. Jones, 112 Wn.2d 488, 494, 772 P.2d 496, 499 (1989).

The purpose of the expert's testimony was to explain inconsistencies between the child's testimony and her out-of-court statements. The child testified that petitioner had rubbed her private parts. In contrast, some of the out-of-court statements indicated that petitioner put his finger inside her. Since the State did not introduce

testimony concerning these statements at the dependency hearing,[3] there was little reason to offer expert testimony to explain the inconsistency.

Petitioner also claims that Washington courts would have applied collateral estoppel in a subsequent civil proceeding against him. He does not cite any authority for this claim, and it does not appear to be correct. In its decision in this case, the Washington Court of Appeals used exactly the same test for collateral estoppel as it would use in a civil case. Compare State v. Cleveland, 58 Wn. App. 634, 639, 794 P.2d 546, 549 (1990) (appendix to Petition at

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[3] In cross-examining the social worker at the dependency hearing, the mother's attorney did elicit one of the inconsistent statements.

A-5) with Beagles v. Seattle-First Nat'l Bank, 25 Wn. App. 925, 929, 610 P.2d 962, 965 (1980).

The Washington Court of Appeals has consistently held that collateral estoppel will only be applied if the parties in the first proceeding had a full and fair opportunity to litigate the issues. See, e.g., Fahlen v. Mounsey, 46 Wn. App. 45, 50, 728 P.2d 1097, 1100-01 (1986). In the present case, the Court essentially held that, because of the urgency of dependency proceedings, the State does not have a full and fair opportunity to litigate them. There is no reason to think that, if a subsequent civil proceeding were involved, the Court's reasoning would be any different.

Petitioner suggests that the decision in this case is contrary to Lockwood v. Superior Court, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984). There, the California Court of Appeals held that a finding in a juvenile dependency proceeding bars criminal prosecution based on the same allegations, despite the different purposes of the two proceedings. Id. at 672, 206 Cal. Rptr. at 787-78. In Lockwood, the criminal defendants were parties to the civil case. Thus, Lockwood does not involve non-mutual collateral estoppel.

The continuing validity of Lockwood is also questionable in light of the recent decision by the California Supreme

Court in Lucido v. Superior Court, 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223 (1990). Lucido holds that a finding in favor of the defendant in a probation revocation proceeding does not collaterally estop criminal proceedings based on the same allegations. According to the California Supreme Court, "[t]he differences between revocation hearings and criminal trials outweigh whatever adverse effect inconsistent factual determinations would have on the integrity of the judicial system." Id., 272 Cal. Rptr. at 776, 795 P.2d at 1232. Non-criminal proceedings will estop criminal trials "only when compelling public policy considerations outweigh[] the need for determinations of guilt and

innocence to be made in the usual criminal trial setting." Id, 272 Cal. Rptr. at 775, 795 P.2d at 1231. This reasoning suggests that the California Supreme Court would not agree with Lockwood.

In short, the issue in this case is not simply whether collateral estoppel must be applied from civil to criminal cases. The issue is whether non-mutual collateral estoppel must be applied to findings in civil cases, even though it is not applied to findings in criminal cases. This court's analysis in Standefer provides a strong obstacle to application of collateral estoppel under these circumstances.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this _____ day of February, 1991.

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